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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS RAMIREZ, Defendant and Appellant.	B201295 (Los Angeles County Super. Ct. No. BA313708)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles F. Palmer, Judge. Affirmed.

Robert H. Pourvali, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Luis Ramirez appeals from the judgment entered following his conviction by a jury on one count of second degree robbery (Pen. Code, § 211)[1] and one count of attempted second degree robbery (§§ 664, 211). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Summary of the Evidence Presented at Trial*

a. *The People's case*

Christina Ceballos testified she was walking from high school when a car pulled up next to her. Ramirez jumped out of the car, ran toward Ceballos and demanded her cell phone and MP3 player. After Ceballos asked Ramirez if he was serious, he lifted his shirt to reveal what Ceballos described as the handle and trigger of a gun in his pocket. Ceballos, who was now scared, handed Ramirez her cell phone and MP3 player. Ramirez got back into his car and began to drive away; Ceballos started walking in the opposite direction toward school.

Moments later, Ramirez backed his car up to Ceballos and, without getting out, asked for her wallet, which was in her back pocket. Ceballos started running and flagged down a passing car. After explaining what had happened, the driver took Ceballos to the police station and gave her a piece of paper to write down the license number of Ramirez's car, which she had memorized.

Los Angeles Police Detective Luis Corona testified he spoke with Ceballos at the police station. Based upon the license plate number Ceballos had provided, Corona was able to locate a photograph of Ramirez. A few hours after Ceballos had identified Ramirez from a photographic lineup as the man who had taken her property, Corona and his partner went to Ramirez's house. After he was arrested outside the house, Ramirez asked his mother to retrieve Ceballos's cell phone and MP3 player from inside the house. In a search incident to Ramirez's arrest Corona also found a silver lighter in the shape of a small handgun in Ramirez's pants pocket.

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[1] Statutory references are to the Penal Code.

2. *Ramirez's defense*

Testifying on his own behalf, Ramirez insisted he was at home with his mother, sister and girlfriend the day of the incident. That afternoon Ramirez had loaned his car to David, who had at one time lived around the block. Although Ramirez had known David for about six years and had previously loaned him his car, Ramirez did not know his last name, where he currently lived or whether he had any brothers or sisters. According to Ramirez, about one or two hours before the police arrived at his house, David had returned Ramirez's car and told him he had committed a robbery. David had Ceballos's cell phone and MP3 player with him, but left the items at Ramirez's house. David was mad because Ramirez "had told him not to do those kinds of stuff while he was driving [Ramirez's] car." Ramirez also testified he had owned the gun-shaped lighter found in his pants pocket for one to two months.

Ramirez's mother testified Ramirez was home all day with her and his girlfriend. She also testified a young man visited Ramirez sometime that day, but she did not know who he was.

3. *The Jury Instructions*

The trial court instructed the jury with Judicial Council of California Criminal Jury Instruction (CALCRIM) No. 1600,[2] defining the elements of the crime of robbery and

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[2] CALCRIM No. 1600 as given to the jury stated, "The defendant is charged in Count 1 with robbery. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took property that was not his own; [¶] 2. The property was taken from another person's possession and immediate presence; [¶] 3. The property was taken against that person's will; [¶] 4. The defendant used force or fear to take the property or to prevent the person from resisting; [¶] and [¶] 5. When the defendant used force or fear to take the property, he intended to deprive the owner of it permanently or to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property. [¶] The defendant's intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using the force or fear, then he did not commit robbery. [¶] A person takes something when he or she gains possession of it and moves it some distance. The distance moved may be short. [¶] The property taken can be of any value, however slight. [¶] Fear, as used here, means fear of injury to the person himself or herself. [¶]

CALCRIM No. 460,[3] describing attempted robbery. The following day the court informed counsel it had determined further instruction was warranted, directed to the question whether the attempt to take Ceballos's wallet constituted a separate crime from the taking of her cell phone and MP3 player. The court explained, "[I]n *People v. Ramirez* [(1995) 39 Cal.App.4th 1369, 1375], the court states in pertinent part, quote, whether a robbery is over is a determination for the trier of fact unless the court determines, as a matter of law, that the infliction of great bodily injury is so far removed in terms of time or distance that the robbery is over as a matter of law, close quote. . . . In the present case, if the robbery was not over, the defendant could not be convicted of count 2 as a separate crime. I don't find as a matter of law in light of these cases that the

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Property is within a person's immediate presence if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear. [¶] An act is done against a person's will if that person does not consent to the act. In order to consent, a person must act freely and voluntarily and know the nature of the act."

[3] CALCRIM No. 460 as given to the jury stated, "The defendant is charged in count 2 with attempted robbery. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took a direct but ineffective step toward committing robbery; [¶] AND [¶] 2. The defendant intended to commit robbery. [¶] A direct step requires more than merely planning or preparing to commit robbery or obtaining or arranging for something needed to commit robbery. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to commit robbery. It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt. [¶] A person who attempts to commit robbery is guilty of attempted robbery even if, after taking a direct step towards committing the crime, he or she abandoned further efforts to complete the crime or if his or her attempt failed or was interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing robbery, then that person is not guilty of attempted robbery. [¶] To decide whether the defendant intended to commit robbery, please refer to the separate instructions that I have given you on that crime. [¶] The defendant may be guilty of attempt even if you conclude that robbery was actually completed."

attempted robbery of the wallet in this instance was so far removed in terms of time and distance that the robbery was over as a matter of law. Accordingly, whether the robbery was completed is a matter for the jury to determine."

The trial court provided counsel with its proposed instruction: "Count 1 charges the defendant with the robbery of a cellular telephone and an MP3 Player. Count 2 charges the defendant with the attempted robbery of a wallet. You may not find the defendant guilty of count 2 unless you first find that the robbery alleged in Count 1 had been completed. The crime of robbery is not complete until the robber has reached a place of temporary safety. The issue is whether the robber has actually reached a place of temporary safety, not whether he thought that he had reached such a location. The scene of a robbery is not a place of temporary safety." The prosecutor objected to the instruction as written, arguing the sentence "the scene of a robbery is not a place of temporary safety" should be clarified to explain that "the commission of a robbery is not confined to a fixed place or a limited period of time." Ramirez argued, if the court intended to give the instruction,[4] it should give it as written or, alternatively, include additional language identifying factors the jury should consider in determining whether Ramirez had reached a place of temporary safety.[5] The court ultimately instructed the jury as it had initially proposed.

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[4] Ramirez had unsuccessfully moved under section 1118.1 for acquittal on the attempted robbery count on the ground Ramirez's demand for Ceballos's wallet was under the same "umbrella" as the taking of the cell phone and MP3 player. After the trial court proposed the additional instruction, Ramirez argued the statement the scene of the crime is not a place of temporary safety further supported his contention only one crime had occurred and justified granting his 1118.1 motion. The court, however, reiterated its conclusion whether one or two crimes had occurred was a question for the jury.

[5] The factors Ramirez proposed were the defendant's subjective belief as to whether he had reached a place of temporary safety (contrary to the court's proposed instruction); whether the defendant had an opportunity to dispose of some or all of the loot from the crime; and any other facts relevant to determining whether the defendant had reached a temporary place of safety.

4. *The Jury Verdict and Sentencing*

The jury found Ramirez guilty of second degree robbery and attempted second degree robbery. The court sentenced him to a state prison term of three years (the middle term) for second degree robbery and to a concurrent middle term of two years for attempted second degree robbery. The sentence on both counts was suspended, and Ramirez was placed on formal probation for three years and ordered to serve 365 days in Los Angeles County Jail.

CONTENTIONS

Ramirez contends his conviction for attempted robbery was improper because his demand for Ceballos's wallet was part of the same course of conduct as the taking of her cell phone and MP3 player; even if properly convicted of separate crimes, the court erred in sentencing him on both convictions; and the jury was inadequately instructed.

DISCUSSION

1. *Substantial Evidence Supports the Jury's Finding the Robbery and Attempted Robbery Were Separate Offenses*

A defendant may not be convicted of multiple counts of robbery if he or she steals several items by force or fear in a "continuing transaction." (*People v. Rush* (1993) 16 Cal.App.4th 20, 25, disapproved on other grounds in *People v. Montoya* (2004) 33 Cal.4th 1031, 1036, fn. 4; see *People v. Brito* (1991) 232 Cal.App.3d 316, 326, fn. 8 ["[w]hen a defendant steals multiple items during the course of an indivisible transaction involving a single victim, he commits only one robbery or theft notwithstanding the number of items he steals"].) "[A] robbery continues until the defendant has escaped with the stolen goods and has reached a place of temporary safety." (*Brito*, at p. 326, fn. 8; accord, *People v. Young* (2005) 34 Cal.4th 1149, 1177 ["robbery is not complete until the perpetrator reaches a place of temporary safety"].) "'[T]he scene of a robbery is not a place of temporary safety.'" (*Young*, at p. 1177.)

Whether a robber has reached a place of temporary safety is a question of fact for the jury, involving an objective, not a subjective, determination. (*People v. Johnson* (1992) 5 Cal.App.4th 552, 559-560.) "'[A] jury's implied finding on the issue will be

upheld so long as supported by substantial evidence. [Citations.]' [Citation.] We review the whole record, in a light most favorable to the judgment, to determine whether it discloses substantial evidence -- evidence which is reasonable, credible and of solid value -- whether direct or circumstantial, and even if exculpating inferences might seem to us reasonable as well." (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1291.)

Ramirez argues the record in this case established there was a single, continuous transaction during which he took a few items from Ceballos and unsuccessfully attempted to take her wallet. Because he did not reach a place of temporary safety until after he demanded Ceballos's wallet, Ramirez asserts, his attempted robbery conviction must be set aside.

Based on Ceballos's testimony Ramirez backed his car toward her after he had begun to drive away and she was walking in the opposite direction, the jury could have reasonably concluded Ramirez had reached a place of temporary safety before returning to demand her wallet. Ramirez had left the scene of the first robbery or "transaction" -- the area of the sidewalk where he had taken Ceballos's cell phone and MP3 player -- and begun to drive away without being pursued or at risk his robbery would be imminently thwarted. While it may have been only a few moments until Ramirez decided to return and to take Ceballos's wallet, the fact he had begun to safely drive away is sufficient evidence to support the jury's finding the initial transaction had been completed and a second one initiated. (See *People v. Thongvilay* (1998) 62 Cal.App.4th 71, 90-91 ["burglary was complete because defendants, as a matter of law, had reached a 'place of temporary safety' when they returned to their car with the stolen stereo and drove away without being pursued"].)

People v. Brito, *supra*, 232 Cal.App.3d 316, upon which Ramirez relies, does not compel a different conclusion. Brito leaned into a car that had pulled over on a freeway on-ramp to give the hitchhiking Brito a ride. When the driver opened the passenger door, Brito pointed a gun toward his face and demanded gold and money. As motorists who could not pass began to honk, Brito looked away; and the driver fled through the driver's door. Brito shot him in the back and drove away in his car. (*Id.* at p. 320.) Brito argued

on appeal the trial court had erred in refusing to instruct on theft as a lesser included offense of robbery predicated on the argument, among others, he did not form the intent to steal the car until after he had completed his use of force. Rejecting Brito's argument, the Court of Appeal stated, "A defendant commits only one robbery no matter how many items he steals from a single victim pursuant to a single plan or intent." (*Id.* at p. 326.) The court "conclude[d] that since it is clear Brito intended to rob [the driver] at the time he applied the force, his taking the vehicle when it was vacated by [the driver] because of his fear constituted the robbery of the vehicle." (*Ibid.*)

Unlike *Brito*, in which the defendant clearly did not retreat to a place of temporary safety and there was a continuous application of force or fear supporting a reasonable inference the defendant had acted pursuant to a single plan or intent, Ramirez took refuge in his car; and the threat he posed was interrupted. It was only after Ramirez drove away that he decided to return to his victim to rob her once again. Thus, the jury could have reasonably found the initial robbery was completed before Ramirez attempted to take Ceballos's wallet pursuant to a later-formed separate plan or intent.

2. *The Trial Court Was Not Required To Stay the Sentence for Attempted Robbery Pursuant to Section 654*

Section 654[6] prohibits punishment for two offenses arising from the same act or from a series of acts constituting an indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1216; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; see *Latimer*, at p. 1208.) On the other hand, if the defendant entertained

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[6] Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

multiple criminal objectives that were independent and not incidental to each other, he or she "may be punished for each statutory violation committed in pursuit of each objective" even though the violations were otherwise part of an indivisible course of conduct. (*Harrison*, at p. 335.) "'The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple.' [Citation.] 'A defendant's criminal objective is "determined from all the circumstances . . . ."'" (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.)

Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.)[7] Its findings will not be reversed on appeal if there is any substantial evidence to support them. (*Hutchins*, at p. 1312; *Herrera*, at p. 1466; *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657.) "We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143; see *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271 [trial court's finding of "'separate intents'" reviewed for sufficient evidence in light most favorable to the judgment].)

Just as the evidence was sufficient for the jury to find Ramirez completed the first robbery before formulating a separate intent or plan to attempt to steal Ceballos's wallet for purposes of convicting Ramirez of separate crimes, so too was the evidence sufficient to support a finding of multiple criminal objectives for sentencing purposes.

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[7] Contrary to Ramirez's argument, because section 654 potentially reduces the defendant's aggregate sentence when it applies and does not increase the statutory maximum term for each separate offense when it does not (see *People v. Cleveland* (2001) 87 Cal.App.4th 263, 270), neither *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.ed.2d 856] nor *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] requires that this determination be made by the jury.

3. *Error, If Any, in Instructing the Jury Was Harmless*

As discussed, the trial court instructed the jury it could not find Ramirez guilty of attempted robbery as charged in count 2 unless it found the robbery charged in count 1 had been completed and further instructed the crime of robbery is not completed until the robber has reached a place of temporary safety. Ramirez does not contend these instructions misstated the law, but argues, although the jury was told the scene of the robbery is not a place of temporary safety, the trial court committed prejudicial error by failing to define "scene of the robbery" or to give further content to the concept of a place of temporary safety.

We need not determine whether Ramirez forfeited this argument by expressly requesting that the instruction, if given at all, be given as proposed by the court or whether Ramirez received ineffective assistance of counsel as a result of his counsel's approval of the instruction and failure to request further instructions.[8] First, although trial courts generally have a duty to define technical terms that have meanings peculiar to the law, there is no duty to clarify, amplify or otherwise instruct on commonly understood words or terms used in statutes or jury instructions. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1022.) Here, the court did not need to instruct on the meaning of "scene of the robbery" because that phrase is readily understandable to the average lay juror and has no special or technical meaning. (See *People v. Estrada* (1995) 11 Cal.4th 568, 574 ["When a word or phrase '"is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request."' [Citations.] A word or phrase

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[8] A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. (*People v. Lewis* (2001) 26 Cal.4th 334, 380; *People v. Lang* (1989) 49 Cal.3d 991, 1024.) Although Ramirez had suggested the possibility of instructing the jury on factors to be considered in determining whether he had reached a temporary place of safety, Ramirez clearly expressed his preference the jury be instructed as the court had proposed. His counsel stated, "I'm happy with the court going with what it has right now, the way it has it. We can argue about what the scene is. That's fine without making any changes to the court's intended instruction."

having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning."].)

Second, as to the meaning of place of temporary safety, even if the court had a sua sponte obligation to provide further instruction, any error in failing to do so was harmless. (See *People v. Mower* (2002) 28 Cal.4th 457, 484 [if trial court's instructional error violates California law, appellate court applies harmless error standard stated in *People v. Watson* (1956) 46 Cal.2d 818, 836].) Ramirez does not suggest what additional instruction should have been given. A place of temporary safety, however, is defined in CALCRIM No. 1603, used when a defendant is charged with aiding and abetting a robbery and a question exists about when the defendant formed the intent to aid and abet. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165 ["for conviction of the more serious offense of aiding and abetting a robbery, a getaway driver must form the intent to facilitate or encourage commission of the robbery *prior to or during the carrying away of the loot to a place of temporary safety*"].) CALCRIM No. 1603 states, "To be guilty of robbery as an aider and abettor, the defendant must have formed the intent to aid and abet the commission of the robbery before or while a perpetrator carried away the property to a place of temporary safety. [¶] A perpetrator has reached a place of temporary safety with the property if he or she has successfully escaped from the scene, is no longer being pursed, and has unchallenged possession of the property." (See also CALCRIM No. 3261 [similar definition of place of temporary safety in "escape rule" instruction given if required to explain duration of felony for ancillary purposes, such as use of weapon].) Assuming CALCRIM No. 1603's definition of place of temporary safety is also appropriate when determining whether a robbery is completed for purposes of multiple convictions, there is simply no evidence Ramirez had not reached a place of temporary safety: Ramirez had escaped from the scene by retreating to his car and driving away, was not being pursued and had unchallenged possession of Ceballos's property. Accordingly, it is not reasonably probable Ramirez would have obtained a more favorable outcome if the jury had been given this additional definition of a place of temporary safety.

DISPOSITION

The judgment is affirmed.

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PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.